

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

ALLERGAN, INC. and DUKE UNIVERSITY,

Plaintiffs,

v.

APOTEX INC. and APOTEX CORP.,

Defendants.

Case No. 1:10-CV-681-CCE-WWD

**CONSENT MOTION TO CONSOLIDATE CASE NOS. 1:11-CV-298-CCE-WWD
AND 1:10-CV-681-CCE-WWD PURSUANT TO FED. R. CIV. P. 42(a)**

Plaintiffs, Allergan, Inc. and Duke University (“Plaintiffs”), by counsel, and with consent of all concerned parties, respectfully submit this Consent Motion to Consolidate Case Nos. 1:11-CV-298-CCE-WWD and 1:10-CV-681-CCE-WWD pursuant to Fed. R. Civ. P. 42(a). In support of this motion, Plaintiffs state as follows:

1. Plaintiffs instituted *Allergan, Inc. and Duke University v. Apotex Inc. and Apotex Corp.*, Civil Action No. 1:10-CV-681-CCE-WWD (the “Apotex case”), in this Court on September 8, 2010 asserting claims against Apotex Inc. and Apotex Corp. (collectively “Apotex”) for infringement of U.S. Patent Nos. 7,351,404 (“the ‘404 patent”), 7,388,029 (“the ‘029 patent”), and 6,403,649 (“the ‘649 patent”) under U.S.C. § 271(e)(2) arising from Apotex’s Abbreviated New Drug Application (“ANDA”) No. 201894 seeking FDA approval for development, manufacture, and sale of a Bimatoprost Topical Solution, 0.03%, a generic version of Allergan’s hypotrichosis treatment, Latisse®, prior to expiration of the ‘404 and ‘029 patents based on claims of invalidity and noninfringement.

2. Plaintiffs instituted the similar case of *Allergan, Inc. and Duke University v. Sandoz, Inc.*, Civil Action No. 1:11-CV-298-CCE-WWD (the “Sandoz case”), in this Court on April 15, 2011. In the Sandoz case, Plaintiffs assert the same claims against Sandoz, Inc. (“Sandoz”) for infringement of U.S. Patent Nos. 7,351,404 (“the ‘404 patent”), 7,388,029 (“the ‘029 patent”), and 6,403,649 (“the ‘649 patent”) under U.S.C. § 271(e)(2) arising from Sandoz’s ANDA No. 202719 seeking FDA approval to engage in commercial manufacture, use, and sale of a Bimatoprost Topical Solution, 0.03%, a generic version of Latisse®, prior to expiration of the ‘404 and ‘029 patents based on claims of invalidity and noninfringement.

3. Both actions remain pending presently before the Court and have been assigned to District Judge Catherine C. Eagles and Magistrate Judge Wallace W. Dixon.

4. The Apotex case and Sandoz case involve common questions of law and fact relating to the claims of infringement and validity of the ‘404 patent, the ‘029 patent, and the ‘649 patent.

5. The parties to the Apotex case filed their Joint Rule 26(f) Report on February 16, 2011. The Court issued an Order adopting Plaintiffs’ and Apotex’s Joint Rule 26(f) Report and assigning an exceptional case management track on February 17, 2011.

6. The parties to the Sandoz case have not yet filed their Joint Rule 26(f) Report.

7. Apotex and Sandoz have consented to this motion to consolidate. Sandoz has agreed to be bound by the schedule as set forth in the Court’s Scheduling Order entered in the Apotex case with two exceptions. Counsel for Sandoz has a pre-existing

conflict for the trial date presently set for the October 2012 Calendar Term in the Apotex case. (Docket No. 33). Counsel for Plaintiffs has a pre-existing conflict during the Court's November 2012 Calendar Term. The parties therefore request that the trial date for both actions be set for a date that will accommodate all counsel's existing calendars, and will be set by the Court upon conferring with the parties during the course of discovery. The parties also request that the start of fact depositions be moved from August 23, 2011 to October 21, 2011. Sandoz has agreed to all other deadlines contained within the Scheduling Order entered in the Apotex case and, accordingly, consolidation of the Apotex case and Sandoz case will not result in undue delay of either proceeding.

8. Consolidation of the Apotex case and Sandoz case will promote judicial economy and efficiency and will not prejudice any party.

9. Apotex and Sandoz consent to this motion to consolidate.

WHEREFORE, based on the foregoing, and for the reasons more particularly stated in the Memorandum in Support of Motion to Consolidate Case Nos. 1:11-CV-298-CCE-WWD and 1:10-CV-681-CCE-WWD Pursuant to Fed. R. Civ. P. 42(a) filed herewith, Plaintiffs respectfully request, with Apotex's and Sandoz's consent, that this Court consolidate the Apotex case and Sandoz case into a single proceeding following the schedule set forth in the Joint Rule 26(f) Report in the Apotex case with the two modifications noted in paragraph 7 above.

Respectfully submitted,

Dated: August 2, 2011

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing CONSENT MOTION TO CONSOLIDATE CASE NOS. 1:11-CV-298-CCE-WWD AND 1:10-CV-681-CCE-WWD PURSUANT TO FED. R. CIV. P. 42(a) with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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